INDRANI C RAJARATNAM & ORS.

v.

FAIRVIEW SCHOOLS BHD.

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[COMPANIES (WINDING UP) NO: D5-28-280-1994]
15 APRIL 1997

COMPANY LAW: *Directors - Fiduciary duties - Meetings - Irregularities - Proxies - Rejection - Winding up - Directors acting in their own interests - Dissolution - Just and equitable rule - Petition - Companies Act 1965, ss. 123(4), 149(1)(b) & 218(1)(e), (f) & (i)*

CIVIL PROCEDURE: *Costs - Costs follow the event - Directors to pay costs - Winding up of company - Trial - Preliminary points of law - Winding-up proceedings*

LAW OF TRUST: *Company law - Winding up - Resulting trust*

Pursuant to an application by a group of members of the Parent/Teacher Association of Garden School ('the founders'), the Secretary General of the Ministry of Education by way of a letter dated 28 July 1978 directed the Registrar of Schools Selangor/Wilayah Persekutuan to establish three schools, that is, the Kindergarten, the Primary, and the Secondary School known as Fairview Schools Association ('the schools'). The said letter clearly stated that the sponsors intended the Schools to be operated on a **non-profit** basis. Temporary registration certificates were issued on 1 September 1978 in the name of one Ahmad Roose as Chairman of the schools.

Subsequently, the founders incorporated the respondent to provide an opportunity to parents with children in the schools to have a say in overseeing the management of the schools. The nominal capital of the respondent was RM50,000 divided into 50,000 ordinary shares of RM1 each and its paid-up capital at the time of this petition was RM23,150. Its membership was confined to parent-shareholders, with each family limited to one unit of RM50 share. The said shares remained at par value even though transferable at a later date to an incoming parent. The purchase value of the share was treated as a refundable deposit on demand by its shareholders.

At all material times, the affairs of the respondent were conducted on a non-profit basis in accordance with the condition imposed by the Ministry of Education. The schools had developed from a population of five students in

1978 to 500 in 1992 and also managed to secure a three-acre piece of land in Wangsa Maju for its expansion.

On 11 November 1992 an extraordinary general meeting ('EGM') was held to decide on an increase of school fees by 30%. At the meeting which was chaired by Ahmad Roose, one K.B. Thuraisingham and a few others purported to pass a vote of no confidence in the then Board of Directors which resulted in the Chairman quitting and the said Thuraisingham appointed to chair the meeting instead.

On 17 November 1992 and without proper notices to and without the knowledge of all members of the then Board of Directors, a Board of Directors' meeting was convened to accept the resignation of the existing directors and to appoint new directors to the Board of Directors. P.S. Sundram, having secured a copy of the minutes of this meeting, registered his protest.

On 7 March 1993, another EGM was held to remove P.S. Sundram and another as directors of the respondent and to re-elect directors and re-appoint auditors and to adjourn the annual general meeting ('AGM') to a later date. The said Thuraisingham was made the Chairman of the Board of Directors of the respondent.

On 28 August 1994, the Board of Directors of the respondent convened an EGM and an AGM for the purpose of *inter alia* removing the present auditors of the respondent and raising the authorized and paid-up capital of the respondent. The relevant portions of the proposed agenda for the EGM read as follows:

(i) Subject to the approval of the Securities Commission, the paid up capital of the company be increased from RM23,150 to RM4,023,150 by the issue of 4,000,000 shares of RM1 each for cash.

(ii) That ... the directors be and are hereby authorized to make available for application 4,000,000 shares of RM1 each at part to Qualified Persons who shall be either shareholders or parents of students currently in the school.

(iii) That on the acceptance of applications from Qualified Persons, the directors shall:

(a) allot not less than 10,000 but not more than 40,000 shares to each applicant;

(b) in the event the total number of shares applied for are less than 3,000,000 the directors shall not allot any shares.

4. That in the event no shares are issued by virtue of the conditions prescribed in resolution (iii)(b) not being met, the directors be authorized to make available for subscription:

(a) not less than 3,000,000 shares of RM1 each at a premium to be agreed to an educational institution to be selected by members from the list of vetted institutions circulated to members not less than 10 days before the date of this EGM.

(b) the balance shares of RM1 each at par be made available for application by the Qualified Persons equally or pro rata.

The Board had also entered into discussion with Kolej Damansara Utama ('KDU') which was prepared to subscribe for RM3 million as capital and to allow the existing shareholders and parents to subscribe up to RM1 million.

Three days before the said EGM of 28 August 1994, the petitioners brought the present action to wind up the respondent on three grounds pursuant to s. 218(1)(e), (f) and (i) of the Companies Act 1965.

Held:

[1] The respondent was in effect a domestic company which comprised of many families who had become associated as members and which enabled them to participate in the overseeing and managing of the affairs of the schools. There remained a clear distinction between overseeing the management of the schools and ownership of their certificate of registration which gave the right to operate the schools, and the assets. As the overseer, the respondent was entrusted *inter alia* with the management of the schools' funds and all other assets and all accounts were made up in its name. The respondent therefore stood in law in the position of a trustee *vis-a-vis* the founder members by reason of a presumed resulting trust arising when the ongoing schools were placed in their care and charge without any consideration whatsoever moving from the respondent to the founders.

[2] It is the paramount duty of the directors to make all reasonable disclosures to the shareholders, more so at an EGM when decisive resolutions were being considered. This duty is one arising in tort and as being "no more than a particular application, to directors who assume responsibility for giving advice to shareholders, of the general duty to act honestly and with due care". The mere fact that information had been suppressed from the

shareholders justified the Court to hold that the directors had breached their fiduciary duty.

[3] For a winding-up petition to succeed under s. 218(1)(e) of the Companies Act 1965, there had to be statements in the petition to suggest that "inability to pay debts" was one of the grounds of the petition. A petitioner must allege and prove the facts entitling him to present it, showing that one or more of the grounds specified in the Companies Act for making a compulsory order exists. Unless these allegations are contained in the petition, the Court will not travel outside the allegations in the petition. The application to wind-up the respondent under s. 218(1)(e) was refused by the Court.

[4] The Board of Directors had acted in their own interest rather than in the interest of the members as a whole and the respondent should be wound up pursuant to s. 218(1)(f) of the Companies Act 1965. As from 11 November 1992, the provisions of the Articles of Association of the respondent and the Companies Act 1965 had been repeatedly breached by its Board of Directors. The sudden and unwarranted proposal of a vote of no confidence by K.B. Thuraisingham at the EGM of 11 November 1992 and the situation that ensued was not in the best interest of the schools. The lack of notice for the meeting of the Board of Directors on 17 November 1992 was a contravention of art. 123 of the articles of association of the respondent. Then on 7 March 1993 at an EGM, P.S. Sundram and another director were removed. Having set the stage, the Board of Directors then proceeded to move the resolutions as set out at their 28 August 1994 EGM and set into motion their ultimate goal of disposing the assets and the right to operate the schools to the detriment of the interest of the shareholders of the respondent. There was also a deliberate attempt by the Board not to advise the shareholders of the respondent as to the implications of s. 149(1)(b) of the Companies Act 1965 thus resulting in proxies appointed by members being disallowed to vote at the EGM held on 28 August 1994. This was despite the fact that Art. 81 of the Articles of Association of the respondent expressly provided for acceptance of proxy votes and hence s. 149(1)(b) of the Companies Act 1965 would not invalidate such acceptance. Section 149(1)(b) would come into play only if the Articles of Association are silent on the subject and that was not the case here.

[5] As for the petition for winding-up pursuant to s. 218(1)(i) of the Companies Act 1965, the Court found that the directors had embarked on a course of conduct with the ultimate intention of disposing the schools together with their assets and even the certificates to operate the schools

to KDU. The end result would be that the shareholding in the respondent would be taken over by a group whose interest in the respondent would be purely commercial, contrary to the "non-profit" basis of operation as set out in the earlier directive by the Ministry of Education. In so doing, the directors had in effect brought to an end the very objective and purpose of the respondent's existence and had infringed their equitable obligation towards the petitioners. Where a company was virtually a partnership and where the company was formed on the basis of mutual trust and confidence between people and that mutual trust and confidence no longer exists, and there would be a deadlock in a company, then it would be just and equitable to wind up the company. Thus, the respondent should be wound up under s. 218(1)(i) of the Companies Act 1965.

[6] The rule in civil suits that one cannot, without the leave of Court, amend to add a cause of action which arose after the issue of the writ, does not apply in this case. The petition was filed by the petitioners in view of the EGM of 28 August 1994 and contained sufficient material to link to the meeting. The matters concluded on 28 August 1994 and relied on by the petitioners in their affidavit were purely evidence to support the petition.

[7] On the issue of costs, since the costs ought to follow the event, the Court ordered costs to the petitioners. The directors who took over the Board on 11 November 1993 ought also to pay the costs of the petition as the whole episode was precipitated by them who intermeddled in the affairs of the respondent. The Court held that the petitioners do file an action against the directors for the recovery of these costs.

Cases referred to:

Re Vandervell's Trusts White and Others v. Vandervell Trustees Ltd. [1974] 1 All ER 47 ***(refd)***

York and North Midland Ry. v. Hudson [1853] 16 Beav. 485 ***(refd)***

Gething v. Kilner [1927] 1 WLR 337 ***(refd)***

Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) [1980] 2 All ER 841 ***(refd)***

Dato' Mohd Sari b Datuk Hj Nuar v. Idris Hydraulic (Malaysia) Bhd. [1996] 3 CLJ 877 ***(refd)***

Foo Yin Shung & Ors. v. Foo Nyit Tse & Brothers Sdn. Bhd. [1989] 2 MLJ 369 ***(refd)***

Cotman v. Brougham [1918] AC 514 ***(refd)***

Ebrahimi v. Westbourne Galleries Ltd. & Others [1972] 2 All ER 492 ***(refd)***

In Re Yenidje Tobacco Company Ltd. [1916] 2 Ch. D 426 ***(refd)***

Sio Koon Lin & Anor. v. S. B. Mehra [1981] 1 MLJ 225 FC ***(refd)***

Hartecon JV Sdn. Bhd. & Anor. v. Hartela Contractors Ltd. [1997] 2 MLJ 104 ***(foll)***

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 7, p. 607

For the petitioners - Yusof Khan; M/s. Yusuf Khan & Pathmanathan
For the respondent - W.S. Davidson (Conrad Young with him); M/s. Azman, Davidson & Co.

JUDGMENT

RK Nathan JC:

The Prologue To The Petition

In response to an application by a group of members of the Parent/Teacher Association of Garden School, amongst whom were three significant members of the *dramatis personae*, namely Ahmad Roose, Dr. I.U. Malik (the 3rd petitioner herein) and P.S. Sundram (the supporting creditor herein and the protagonist in this drama), the Secretary General of the Ministry of Education by way of a letter dated 28 July 1978 (Exh. M2) directed the Registrar of Schools Selangor/Wilayah Persekutuan to issue temporary certificates of registration to establish three schools, that is, the Kindergarten, the Primary and the Secondary School known as Fairview Schools Association, pursuant to the terms and conditions specified in that said letter. Exhibit M2 clearly stated that the sponsors intended the schools to be operated on a non-profit basis and that any profits obtained from operating the schools would be applied to augment the facilities and to upgrade the quality of education.

Pursuant to this directive from the Ministry of Education, temporary registration certificates were issued on 1 September 1978 in the name of Ahmad Roose as chairman of the schools.

There is no doubt in my mind that the avowed objective of the sponsors/ founders, as noted in Exh. M2 by the Secretary General to the Ministry of Education, became the underlying principle and policy for Fairview Schools Association which commenced operation on 11 September 1978 under the management of the founders. The 2nd petitioner, the wife of Ahmad Roose, was its first principal.

Subsequently the founders decided to form a company to provide an opportunity to parents with children in the schools, most of whom being expatriates, to have a say in overseeing the management of the schools. The company envisaged by the founders pursuant to the minutes of the meeting held on 22 November 1978 was confined to parent-shareholders, with each family limited to one unit of RM50 share. The shareholding was however not compulsory. The said shares remained at par value even though transferable at a later date to an incoming parent. The purchase value of the share is to

be treated as a refundable deposit on receipt of a demand notice and nothing more.

The Company Called Fairview Schools Bhd

At the time of incorporation the nominal capital of the respondent was RM50,000 divided into 50,000 ordinary shares of RM1 each and the current paid-up capital is RM23,150. At all material times, the affairs of the respondent were conducted on a non-profit basis in accordance with the condition imposed by the Ministry of Education. The schools had developed from a population of 5 students in 1978 to 500 in 1992 and would have increased further if not for space limitations which prompted the Board of Directors of the respondent to seek alternate premises for the schools. The then Board of Directors managed to secure a three-acre piece of land in Wangsa Maju (Wangsa Maju land) and obtained loan facilities towards its purchase and building costs. Up till 10 November 1992 the affairs and management of the respondent were carried out by the then Board of Directors without any dissension from any quarter. On 11 November 1992 an Extraordinary General Meeting (EGM) was held to decide on an increase of school fees by 30% to meet the upward revision of remuneration of the teaching and non-academic staff and to facilitate the servicing of a loan to meet the purchase of the land and the erection of buildings thereon.

At the scheduled meeting on 11 November 1992 which was chaired by Ahmad Roose, one K.B. Thuraisingham and a few others interrupted the meeting and purported to pass a vote of no confidence in the then Board of Directors allegedly under "a common law right at all gatherings". The meeting becoming unruly and the Chairman quit. The said K.B. Thuraisingham was appointed to chair the meeting despite the presence of two other directors. Some directors resigned. On 17 November 1992 without proper notices to, and without the knowledge of, or notification to, all members on the then existing Board of Directors, a Board of Directors' meeting was convened to accept the resignations and to appoint others. P.S. Sundram, having secured a copy of the minutes of the meeting of 17 November 1992, registered his protest. Another EGM was held on 7 March 1993 to remove P.S. Sundram and another as directors of the respondent and to re-elect directors and re-appoint auditors and to adjourn the AGM to a later date when the audited accounts and directors' report for the year ended 31 August 1992 could be received. Because of the existing state of affairs many staff including two principals resigned. Consequent to the extra term deposit demanded, many students left the schools. K.B. Thuraisingham who had earlier during a meeting declared his non-interest in the directorship of the respondent, was soon made its chairman. By several notices dated 28 August 1994 the Board of Directors had caused to convene

two extraordinary general meetings and an AGM on the same day albeit at different times, for the purpose *inter alia* of removing the company's auditors and raising the authorised and paid-up capital of the company. The petitioners believed that the intended removal of the company's auditors was because the said auditors had identified obvious irregularities in the company's accounts since 1992 which had yet to be passed and submitted to the Registrar of Companies. One of the items in the agenda for the EGM was to amend the Articles of Association to include a Board of Governors of five persons. The petitioners argued that the intended appointment of a so-called Board of Governors was to usurp the authority and function of the Board of Directors which clearly violated the principles of company law. Clauses 1, 2, 3 and 4 of the proposed agenda for the EGM read as follows:

1. Subject to the approval of the Securities Commission the paid up capital of the company be increased from Ringgit 23,150 to Ringgit 4,023,150 by the issue of 4,000,000 shares of RM1 each for cash.

2. That notwithstanding the provisions of Articles 6(a), (b) and (c) of the Articles of Association for the purpose of giving effect to Resolution (1) above the shareholders hereby waive their pre-emption rights and the directors be and are hereby authorised to make available for application 4,000,000 shares of RM1 each at par to Qualified Persons who shall be either shareholders or parents of students currently in the school save and except that the directors shall not allot any shares to any shareholders or parents who are involved directly or indirectly or through a blood relative or spouse with any other International Schools who are in competition with the company.

3. That on the acceptance of applications from Qualified Persons, the directors shall:

   (a) allot not less than 10,000 but not more than 40,000 shares to each applicant;

   (b) in the event the total number of shares applied for are less than 3,000,000 the directors shall not allot any shares.

4. That in the event no shares are issued by virtue of the conditions prescribed in resolution 3(b) not being met, the directors be authorised to make available for subscription subject to the prior approval of the Securities Commission, if required:

(a) not less than 3,000,000 shares of RM1 each at a premium to be agreed to an educational institution to be selected by members from the list of vetted institutions circulated to members not less than 10 days before the date of this EGM.

(b) the balance shares of RM1 each at par be made available for application by the Qualified Persons (as defined in Resolution 2 above) equally or pro rata.

It is my finding that the permit holders had never handed over the ownership of the permits to the respondent. The Ministry had required the schools to be run on a non-profit basis. The attempted conversion of the schools to a profit earning business required the Ministry's approval and such approval if any no doubt can be obtained only by the permit holders. No such clearance had been shown to have been obtained.

It is obvious that for the duration of its existence the respondent had operated on a non-profit basis. The interest of most shareholders ceased once their children had left school. In fact some of the shareholders do not even notify the secretaries of the change in their addresses. Some have even died and their surviving spouses had not bothered to have the RM50 shares transferred to their names. It would have been different had their shares earned dividends for that would have sustained their interest. Now that it is proposed to go commercial the Board had failed to consider their interest. It is clearly unjust and inequitable that the many shareholders whose support saw the schools through can never be made beneficiaries to whatever financial gains that could be obtained. There is no explanation as to why rights issues are not proposed to the extent of the required capital with the right to apply for excess shares as is the normal practice with the right to transfer one's rights to another. It has not been explained why on the basis of equity, the number of shares for which a person is to be eligible is not based on the number of years he has been with the company. As it stands he who joined this year is given the same entitlement as he who has been a shareholder for say fifteen years. It has not been explained as to why there should be a limit of up to RM40,000 and a floor limit of not less than RM10,000. Clause 4(a) is a clear implication of an attempt to hand over the schools to "an educational institution". It is an uncontroverted fact that the shareholders currently number about 460 and it might not be possible for the 460 shareholders to take up amongst them between 10,000 to 40,000 shares each in the company. The end result will be to put into effect cl. 4(a) whereby the shareholding would be taken over by a group whose interest in the respondent would be purely commercial. In this case Chian Ngook For a member of the Board of Directors of the respondent who affirmed an affidavit to oppose the petition, confirmed having discussion

with Kolej Damansara Utama (KDU), an educational institution, which was prepared to subscribe RM3,000,000 as capital and to allow existing shareholders and parents to subscribe up to RM1,000,000.

Respondent, a Domestic Company

In the light of the background facts it is my finding that the respondent cannot therefore be viewed as an ordinary company. I hold that it is a domestic company with restriction on the transfer of shares and the share capital is treated as a refundable deposit to the shareholders on demand at the par value of RM50 only, upon their children ceasing to be educated at the schools regardless of the value of the schools' assets. The respondent is in effect a domestic company comprising many families who have become associated as members which enables them to participate in the overseeing and managing the affairs of the schools.

The shareholding of RM50 merely entitles the parent shareholder to participate in overseeing the affairs of the schools, which were and have always been run by a principal, and teachers registered with the Ministry of Education. It is my judgment that for all intents and purposes there remains a clear distinction between overseeing the management of the schools and ownership of their certificates of registration which gives right to operate the schools, and the assets. Since its inception the respondent did not at all inject any funds towards the operational costs of the schools. The assets of the schools, including any accretion thereto, were the result of the initial investment by the founder-members.

Respondent, a Trustee

I find that the respondent, as the overseer, was entrusted *inter alia* with the management of the schools' funds and all other assets and all accounts were made up in its name. It is my finding that the respondent therefore stands in law in the position of a trustee *vis-a-vis*, the founder-members. It is a fact that neither the certificates of registration nor the assets of the schools were ever transferred by the founders to the respondent for any consideration whatsoever. It is also a fact that neither Ahmad Roose nor any other holder of the certificate ever applied to the Ministry of Education to effect a change of name in the certificates of registration from himself to the respondent.

In the meantime, the respondent had applied to change the name of Ahmad Roose to that of Dato' Ahmad Yunus on 11 April 1983. There was also an application on 23 December 1993 by the respondent to insert the name of one John Saw Teng Chuan in the certificate. However, even before the Ministry's reply on this could be received, the respondent sent in another application on

16 December 1993 for change of chairmanship from John Saw to K.B. Thuraisingham. As to whether the schools or the respondent could decide who the chairman ought to be, I shall not decide on that issue since that issue is *inter alia* the subject of a writ of mandamus against the Registrar of schools filed in the Kuala Lumpur High Court by way of Originating Motion No. R1-25-9-96. Suffice it for me, for the purposes of this petition, to note that the initial certificates issued to Ahmad Roose have never been revoked by the Ministry pursuant to s. 48(3) of the Education Act 1961, which subsection gives the Registrar the right to revoke the certificate of registration "by notice in writing under the hand of the Registrar served on the person to whom the certificate was issued".

In the circumstances, I find that the respondent must be nothing more than a trustee with an overseeing role over the schools founded by the initial group of members of the Parent/Teacher Association whose first chairman was Ahmad Roose. The respondent as a legal entity is to be regarded as a trustee by reason of a presumed resulting trust arising when the ongoing schools were placed in their care and charge without any consideration whatsoever moving from the respondent to the founders. In *Re Vandervell's Trusts White and Others v. Vandervell Trustees Ltd.* [1974] 1 All ER 47 Megarry J (as he then was) in considering the question of resulting trusts said at p. 68:

> ... It seems to me that the relevant points on resulting trusts may be put in a series of propositions ... The propositions are the broadest of generalisations, and do not purport to cover the exceptions and qualifications that doubtless exist. Nevertheless, these generalisations at least provide a starting point for the classification of a corner of equity which might benefit from some attempt at classification. The propositions are as follows.
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> (1) If a transaction fails to make any effective disposition of any interest it does nothing. This is so at law and in equity, and has nothing to do with resulting trusts.
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> (2) Normally the mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result. To yearn is not to transfer.
>
> (3) Before any doctrine of resulting trust can come into play, there must at least be some effective transaction which transfers or creates some interest in property.
>
> (4) Where A effectually transfers to B (or creates in his favour) any interest in any property, whether legal or equitable, a resulting trust for A may arise in two distinct classes of case. For simplicity, I shall confine my statement to cases in which the transfer or creation is made without B

providing any valuable consideration, and where no presumption of advancement can arise; and I shall state the position for transfers without specific mention of the creation of new interests.

(a) The first class of case is where the transfer to B is not made on any trust. If, of course, it appears from the transfer that B is intended to hold on certain trusts, that will be decisive, and the case is not within this category; and similarly if it appears that B is intended to take beneficially. But in other cases there is a rebuttable presumption that B holds on a resulting trust for A. The question is not one of the automatic consequences of a dispositive failure by A, but one of presumption: the property has been carried to B, and from the absence of consideration and any presumption of advancement B is presumed not only to hold the entire interest on trust, but also to hold the beneficial interest for A absolutely. The presumption thus establishes both that A is to take on trust and also what that trust is. Such resulting trusts may be called 'presumed resulting trusts'.

(b) The second class of case is where the transfer to B is made on trusts which leave some or all of the beneficial interest undisposed of. Here B automatically holds on a resulting trust for A to the extent that the beneficial interest has not been carried to him or others. The resulting trust here does not depend on any intentions or presumptions, but is the automatic consequence of A's failure to dispose of what is vested in him. Since ex hypothesi the transfer is on trust, the resulting trust does not establish the trust but merely carries back to A the beneficial interest that has not been disposed of. Such resulting trusts may be called 'automatic resulting trusts'.

(5) Where trustees hold property in trust for A, and it is they who, at A's direction, make the transfer to B, similar principles apply, even though on the face of the transaction the transferor appears to be the trustees and not A. If the transfer to B is on trust, B will hold any beneficial interest that has not been effectually disposed of on an automatic resulting trust for the true transferor, A. If the transfer to B is not on trust, there will be a rebuttable presumption that B holds on a resulting trust for A.

If as alleged by the respondent, the respondent owns the assets acquired solely out of the schools' funds, then this would not only nullify the restriction on the transfer of shares which remain as always at a par value of RM50 but also change the purpose and import for which the respondent was established and further the respondent would be in breach of the trust emplaced in it. If this Court were to accept the respondent's contention that it owns the assets, this would no doubt be a fraud on those families who had redeemed their shares at the agreed par value of RM50 and considering the offer to purchase, which includes the Wangsa Maju land at RM7.9 million, it would therefore

mean that the RM50 share would now be worth a substantial sum which on a rough calculation is RM17,000. Therefore an incoming family which purchases the RM50 share today will automatically enjoy a value increased to RM17,000. Further by allowing KDU to acquire a controlling interest with RM3,000,000 input of the share capital in the respondent, it would mean that KDU would stand to profit by about double the value of its shares. In real terms the directors are allowing KDU to make an instant profit in fraud of those parents who redeemed their shares at par value and the value of the shares of the shareholders still holding onto them would nose-dive from the estimated RM17,000 to a meager sum. Whilst it was repeatedly highlighted to the shareholders that the resolutions of 28 August 1994 were merely to save the schools from closure unless the said resolutions were adopted, the implications of KDU doubling its profits in an instant was, I find, suppressed from the shareholders. It is the paramount duty of the directors to make all reasonable disclosures to the shareholders more so at an EGM when decisive resolutions were being considered. In fact in *York and North Midland Ry. v. Hudson* [1853] 16 Beav. 485, directors who had improperly dealt with funds of the company were held liable as trustees. Romilly MR said:

> The directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust which, if they undertake, it is their duty to perform fully and entirely. A resolution by shareholders therefore, that shares or any other species of property shall be at the disposal of directors, is a resolution that it shall be at the disposal of trustees; in other words, that the persons entrusted with that property shall dispose of it, within the scope of the functions delegated to them, in the manner best suited to benefit their *cestuis que* trust.

English Courts have held directors to be under a duty to act in good faith when giving shareholders advice whether to accept a take-over offer for their shares (see *Gething v. Kilner* [1972] 1 WLR 337) or whether to sanction a scheme for the purchase of a large block of assets from another company (see *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (No. 2) [1980] 2 All ER 841). This duty is one arising in tort and as being "no more than a particular application, to directors who assume responsibility for giving advice to shareholders, of the general duty to act honestly and with due care." It is not for this Court to speculate how the shareholders would have voted on 28 August 1994 if this information had been disclosed. But suffice it to say that the mere fact that this information was suppressed, justifies this Court to hold that the directors had breached their fiduciary duty. In fact had this fact been disclosed, the non shareholder parents who were allowed to attend and speak at the said meeting on 28 August 1994 would have scrambled to purchase the RM50 share so that they could themselves reap an instant bonanza.

The petitioners sought to wind up the respondent on three grounds and I shall consider each one of them in the light of the submissions of the parties and the authorities submitted.

Winding-Up Under s. 218(1)(e) Of The Companies Act 1965 (Inability To Pay Its Debts)

The petitioners argued that the respondent's share capital stands at RM23,150. I was referred to the affidavit of Chian Ngook For who had averred as to the existence of a financial crisis originating from the previous Board. However, the petitioners argue that the financial crisis was caused by the directors of the respondent implementing only a 10% actual fee increase as opposed to a 30% proposed by the previous Board and as opposed to the 20% increase resolved by the members on 11 November 1992. It was this they said which led to the shortfall in operating funds. It was pointed out to me that the respondent was unable to pay the sum of RM12,000 being the managing director's allowance to P.S. Sundram, the supporting creditor, a sum of RM23,000 for the 1992 audit report owing to the respondent's auditor, architects fees of RM120,000 and the two-term refundable deposits amounting to approximately RM800,000 which had been collected and had been utilised to meet operating expenses. It was also submitted that the failure to present to the members the audited annual reports for four successive years since the financial year ending 1992 suggested that there might be other debts and liabilities.

It is my view that this attempt to turn the petition into a creditor's petition ought not to be entertained. There are no statements in the petition to suggest that "inability to pay debts" is one of the grounds of the petition. I find that the petitioners have rather opportunistically seized on certain evidence to suggest that the respondent is under financial difficulties, to change the nature of their case. In his petition, a petitioner must allege and prove the facts entitling him to present it, showing that one or more of the grounds specified in the Companies Act for making a compulsory order, exist. Unless these allegations are contained in the petition, the Court will dismiss it. The Court will not travel outside the allegations in the petition (see *Halsbury's Laws of England,* 4th Edn. Vol. 7 p. 607). Further the six petitioners have filed the petition as shareholders or contributories, not as creditors. It is trite that a winding-up petition cannot be used as a forum for debt collection which debts are *bona fide* disputed. I am also not prepared to extend to contributories as opposed to creditors, the right to wind up a company on the basis of the company's inability to pay its debts.

A creditor whose debt is forthwith due and which has not been paid is entitled to a winding-up order as between himself and the company. However, if there are other creditors opposing the winding-up, then the Court will consider their wishes. The Court may in its discretion, decline to make the order. In this case the main creditors of the company have shown no inclination to wind up the company. The only supporting creditor is P. S. Sundram and his debt is opposed. However, his motive seems to be to recover the schools for himself. Such a claim verges on absurdity. It would seem that the overriding weight of shareholders and parent/creditors, opposes the petition. In the circumstances even if I have the power to entertain this petition as a creditor's petition, in the exercise of my discretion, I decline to make the order on this ground. Further applying the overall assets and liabilities test which I applied in *Dato Mohd Sari b Datuk Hj Nuar v. 1dris Hydraulic (Malaysia) Bhd.* [1996] 3 CLJ 877, I find that if the Wangsa Maju land were to be re-valued, the balance sheet of the company will no longer be in the red. Besides the petitioners themselves had valued a RM50 share at RM17,000. Surely it is not appropriate for the petitioners to approbate and to reprobate.

For all these reasons, the application to wind up the respondent under s. 218(1)(e) is refused.

Winding-Up Under s. 218(1)(f) Of The Act (Directors Have Acted In Their Own Interest)

On this ground, the petitioners are on *terra firma*. It is a fundamental right of every member of the respondent to expect that the directors appointed to the Board of the respondent had been appointed in accordance with the Articles of Association and the provisions of the Companies Act. From 11 November 1992 I find that the provisions in the Articles of Association of the respondent and the Companies Act were more honoured in their breaches than in their observance. The arrogant and defiant stand taken by the chairman during the EGM on 7 March 1993, when questioned as to the credentials of the persons who posed as directors, is reflected by his uncompromising and stinging reply, "You can challenge that in Court. I have made a ruling."

It is my finding upon reading the minutes of the EGM of 11 November 1992 that whilst members were peacefully discussing the affairs of the company the sudden and unwarranted proposal of a vote of no confidence by K.B. Thuraisingham was designed to cause the disruption that ensued and in any case the subsequent acceptance by K.B. Thuraisingham to act as chairman leaves no doubt in my mind that the vote of no confidence passed at the meeting was not in the best interest of the schools. In fact the Board of Directors at its meeting on 17 November 1992 (p. 219 of Bundle R3) had its doubts on the legality of the motion of no confidence which was tabled without

prior notice at the EGM on 11 November 1992. However the Board agreed, for the welfare of the schools, to accept the EGM's decision. It is also pertinent for me to find that in respect of the meeting of the Board of Directors on 17 November 1992 no notice at all was issued in contravention of Art. 123 of the Articles of Association which required notice of every directors' meeting to be sent to each director and/or alternate director. Then on 7 March 1993 at an EGM, P.S. Sundram and another director were removed. Having set the stage the Board of Directors then proceeded to move the resolutions as earlier referred to in Exh. M 14. In fact the letter dated 4 August 1994 from the auditors' solicitors, who were removed by the EGM on 28 August 1994 and annexed as an exhibit to the supporting creditors' submission, (and which was not objected to by the respondent) clearly challenges the very appointment of the Board which took over on 11 November 1992. Page 198 of the Record (R3) states that the only item in the agenda for EGM on 11 November 1992 was to consider the increase in the school fees by 30%. The subsequent interruptions and vote of no confidence digressed totally from its expressed purpose. In any event when the Chairman, Ahmad Roose walked out when the vote of no confidence was presented not one of the other directors who were present was invited to take the chair as provided by Art. 69 of the Articles of Association. This is clearly confirmed by a letter from one of the directors present, namely, J.S. Dhaliwal and which letter was annexed as Annexure 17 to the supporting creditors' submission. In fact when the supporting creditor, P.S. Sundram volunteered to take the chair he was advised against it by the company secretary. The company secretary's lack of total commitment had been questioned by the auditor's letter earlier referred to when it pointed out that his records had not been properly maintained, particularly with regard to accounting records, listing of deposits, minutes of directors' and shareholders' meetings and new transactions such as the purchase of land in Wangsa Maju. It categorically stated (and there is no rebuttal evidence) that that situation had resulted in the unnecessary delay and inconvenience in the auditing of the respondent's accounts.

It is my finding that with complete control of the respondent's Board from 17 November 1992, the current Board set into motion their ultimate goal of disposing the assets and the right to operate the schools. It is my further finding that at the meeting of 28 August 1994 this Board achieved the passage of the substantially amended resolutions after emphasising the financial crisis situation and by further stating that non-support of the resolutions would result in the closure of the schools in September 1994.

Proxy Forms

In announcing the meeting of 28 August 1994 the secretary attached proxy forms that had been in use by the respondent since its inception. The secretary had not revised the format nor advised the shareholders in time, the need if at all, to comply with s. 149(1)(b) of the Act which reads:

> (b) a member shall not be entitled to appoint a person who is not a member as his proxy unless that person is an advocate, an approved company auditor or a person approved by the Registrar in a particular case;

On the eventful day of the meeting, to neutralise any possible dissensions and to ensure safe passage of the resolutions of 28 August 1994, the 'Board' resorted to obtaining legal advice. K.B. Thuraisingham, himself a lawyer, thought fit to obtain this legal advice on 24 August 1994 but he only announced this legal advice on the very day of the EGM. The advice which he announced was that the proxy forms which the respondent's secretary had accepted without reservation on 25 August 1994 were null and void because of s. 149(1)(b) of the Act and that therefore the proxies were not only disallowed to vote but were also rendered mute, on pain of removal by security guards who had been engaged for the first time in the history of the respondent. In all its existence, I find that no such guidelines incorporating the legal requirements were ever made, and it is not in dispute that the same forms had been used in all previous members' meetings including that on 17 March 1993 when P.S. Sundram, the managing director and one other were removed and wherein the same K.B. Thuraisingham was actively involved in the proceedings. Page 233 of the Record (R3) shows that at that meeting on 17 March 1993 one Rajendram who was then not a member exercised 70 votes by proxy being in possession of 70 such proxy forms. It is therefore a foregone conclusion and a clear finding of fact by me that the said Board of Directors had acted in their own interest rather than in the interest of the members as a whole. Despite the fact that the legal advice had been obtained on 24 August 1994, yet none of the members whose proxy forms were accepted on 25 August 1994 without any reservation, was told anything about the said legal advice. If the reason for not informing the members about their invalid proxy was because of time constraint, then in the interest of fair play, the meetings scheduled for 28 August 1994 should have been postponed and members, including proxies told about the new ruling on proxy voting and be given ample time and opportunity to choose a valid proxy.

In any case as for s. 149(1)(b) of the Act, Art. 81 of the Articles of Association of the respondent reads:

> Notes may be given either personally or by proxy attorney or representative. A proxy need not be a member of the company.

It is my judgment therefore that where the Articles of Association expressly provide for acceptance of proxy votes, s. 149(1)(b) will not invalidate such acceptance. The said subsection will come into play only if the Articles of Association are silent on the subject and that is not the case here.

The manipulative conduct of the Board in failing to at least adjourn the meetings on 28 August 1994 leads to only one conclusion and that is, the denial of the proxy votes was an overall plan to pass the resolutions and thereby to dispose of the properties.

In *Foo Yin Shung & Ors. v. Foo Nyit Tse & Brothers Sdn. Bhd.* [1989] 2 MLJ 369 Peh Swee Chin J (as his Lordship then was) said:

> About the phrase 'interests of members as a whole', I have adopted respectfully the interpretation of Bowen CJ in *Equity of New South Wales Supreme Court* in *Re Cumberland Holdings Ltd.* ([1976] 1 ACLR 361) that the phrase means a situation where directors are shown to have preferred their own interests of one, or more or perhaps some significant section of the members so that the action of directors may be open to challenge notwithstanding that it coincides with the interests of the majority shareholder. The test in connection with such challenge seems to be that the said s. 218(1)(f) or para. (f) applies when the directors are seen not to have been acting in the interests of all members and cannot be said therefore to have been acting in the interests of members as a whole.

In the instant case, having read the submissions of both parties on this issue, I order the respondent to be wound up under s. 218(1)(f) of the Act.

Winding-Up Under s. 218(1)(i) Of The Act "Just And Equitable"

The respondent's fear is that if it is wound up, the schools will close down, to the detriment of the children's education. This was the agitprop of the Board and no doubt the reason why none of the parents supported the winding-up petition. The respondent's fear is unwarranted. The schools, the assets and the certificates to operate the schools, were in existence even before the incorporation of the respondent. I had already found the respondent a trustee. The *raison d'etre* of the respondent is strictly to oversee the management of the schools and to enable parent-shareholders to voice their views in regard to matters relating to the schools. I find that by embarking on a course of conduct with the ultimate intention of disposing the schools together with their assets and even the certificates to operate the schools to KDU, an educational institution, the directors are in effect bringing to an end the very objective and purpose of the respondent's existence. With KDU in control of the

respondent its overseeing role shall end and thus the substratum for the respondent's existence shall effectively determine. In *Cotman v. Brougham* [1918] AC 514 at p. 521 Lord Parker of Waddington said:

> ... For the purpose of determining whether a company's substratum be gone, it may be necessary to distinguish between power and object and to determine what is the main or paramount object of the company, ...

I accept the evidence of P.S. Sundram that the role of the respondent is merely to oversee and to manage the schools.

The Quasi-Partnership Relationship

The shareholding of the respondent reflects a combination of families whose individual RM50 share enables each to have an equal say in the affairs of the management of the schools. The fact that the shares are in effect refundable deposit and not in the strict sense a capital investment, dispels the suggestion of a commercial venture. The respondent is in substance an association of families whose interest is necessarily focussed on the provision of quality education at the lowest possible costs. Thus the respondent was formed on the basis of personal relationship involving mutual confidence and the understanding which saw at all times at least one founder member of the schools serving on the Board of Directors of the respondent as was the case until 7 March 1993. Further the restriction on the transfer of the shares, and at par, to parents, ensured parity amongst members. The conduct of the Board culminating in the resolution of 28 August 1994 to invite KDU to invest RM3,000,000 worth of shares in the respondent, in effect destroys the aforesaid family relationship. It is my judgment that in such circumstances the principle in *Ebrahimi v. Westbourne Galleries Ltd. & Others* [1972] 2 All ER 492 applies as the situation which has arisen is outside what the members of the respondent contemplated by the arrangement they entered into when they became members of the respondent and further what the current directors have done is contrary to the assumptions which were the foundation of the agreement amongst members. In *Re Yenidje Tobacco Company Ltd.* [1916] 2 Ch. D 426, W. and R. who traded separately as tobacconists and cigarette manufacturers, agreed to amalgamate their businesses, and in order to do so formed a private limited company in which they were the only shareholders and directors. The constitution of the company was such that under the articles of association W. and R. had equal voting powers, that one director was to form a quorum, and that if any dispute or difference should arise and consequent whereon an inability to pass a directors' resolution should result, the matter in dispute should be referred to arbitration, and the award to be entered in the minute book as a resolution duly passed by the board. Differences arose between the parties. The parties became so hostile that

neither of them would speak to the other, communications having to be conveyed between them through the secretary of the company. In spite of this the company continued to transact business and large profits were made. Affirming the decision of the High Court, the Court of Appeal held that if this were a case of partnership there would clearly be grounds for a dissolution, and that the same principle ought to be applied where there was in substance a partnership in the guise of a private company. The position amounted to a complete deadlock, and it was "just and equitable" that the company should be wound up. It is my judgment therefore that it is not for the respondent herein to say that the directors are acting within their legal rights arising out of the Articles of Association and the law of companies, when they have infringed their equitable obligations towards the petitioners. Where a company is virtually a partnership and where the company was formed on the basis of mutual trust and confidence between people and that mutual trust and confidence no longer exists, and there would be a deadlock in a company, then it is just and equitable to wind up the company. Indeed it is my view that where one has a company incorporated as a proprietary company, under the Act, with restrictions on transfer of shares, one has almost by definition, such a company. I must emphasise that the principles as enunciated in *Yenidje Tobacco Company Ltd.* and in *Westbourne Galleries Ltd.* should not be generally applied to all cases of privately held companies. What I perceive is the binding effect of these two decisions is that, even though what is really a partnership has in effect become an incorporated company in that even though the primary obligation which governs the parties are pursuant to the Articles of Association and the law relating to companies, there will still be the need to give way to equitable obligations between the parties. These obligations will arise in the special cases such as the instant case. However, in this case I find that not only is there a breach of the equitable obligations by the Board, but that at every turn the Board had at its meetings violated the Articles of Association and thus the provisions of the Act.

Election Of Office Bearers At The 14th AGM On 28 August 1994

There were four items on the agenda for the 14th AGM of the respondent held on 28 August 1994. They were:

1. To consider and adopt the Chairman's report and to adjourn the presentation and consideration of the accounts of the company for the year ended 31 August 1993 to a later date.

2.A) To re-elect the following directors retiring in accordance to the Articles of Association of the company and who offer themselves for re-election:

(a) Dr. Gurcharan Singh

(b) En. Abdul Hamid bin Hussain

B) The following directors retire and do not offer themselves for re-election:

(a) Mr. KB Thuraisingham

(b) En. Mazlan bin Khamis

(c) Mr. Jagdish Singh Dhaliwal

(d) Mr. Chian Ngook For

3. To re-appoint auditors/to elect Ernst & Young as auditors of the company.

4. To transact any other business for which due notice shall have been given.

The agenda does not seem to provide for the election of directors amongst other members. Since item four specified the transaction of any other business for which due notice shall be given, the 1st petitioner wrote to the respondent's secretary on 15 August 1994 (p. 400 of record R3) to give the due notice to include in the agenda a provision for the election of directors. By letter dated 18 August 1994 (p. 402 of Record R3) another member gave a similar notice. The respondent's secretary did not respond to these two letters. However at the said meeting K.B. Thuraisingham announced a new procedure with regard to the election of office bearers without prior notification to the members. The procedure was that those wanting to be office bearers had to comply with s. 123(4) of the Act which requires the candidate to make and lodge with the Registrar of Companies and the Official Receiver a statutory declaration in the form prescribed by regulation that he will not be acting in contravention of ss. 125 and 130 of the Act which relate to undischarged bankrupts and to disqualification of directors, and that the said candidate consents to act as a director. Previously, even when the said K.B. Thuraisingham was elected as a director no such requirement was insisted upon, understandably on account of the respondent being in the nature of a company of families. As a result of this new ruling Dr. Gurcharan Singh and Abdul Hamid bin Hussain were disqualified from being re-elected as directors at the said meeting. One interesting concession made by the Board was that despite the omission to include in the agenda the election of directors from amongst the members, this was however allowed but subject to the condition that the new ruling be complied with. This, to my mind, clearly and effectively excluded any member from being in a position to offer himself for election as a director, whilst on

the other hand showing that the Board was willing, not to stick to the letter of the law. However, strangely yet coincidentally three members came duly prepared to offer themselves for election as directors, having complied with the new ruling, obviously with prescience of the same. The three were K.B. Thuraisingham, Mazlan bin Khamis and Chian Ngook For, the three out of the four who had, according to the agenda were retiring as directors and not offering themselves for re-election. Obviously the meeting ought to have been adjourned to allow the members to comply with the requirements.

I have no hesitation in concluding that the conduct of the Board constituted unconscionable acts. Such acts cannot seek the endorsement of this Court. In the circumstances, I make an order to wind up the respondent under s. 218(1)(i) of the Act.

A Preliminary Issue

It was pointed out by the respondent that this petition was filed three days before the EGM of 28 August 1994. This, said the respondent, is of significance in relation to complaints arising out of the meeting held on 28 August 1994. Relying on the rule in civil suits that one cannot without leave of Court, amend to add a cause of action which arose after the issue of the writ (see *Sio Koon Lin & Anor. v. S.B. Mehra* [1981] 1 MLJ 225 FC) the respondent submitted that the same rule must apply by analogy to winding-up petitions. It was submitted that since the petitioners had decided to file the petition before the meeting on 28 August 1994 because of their dislike of the resolutions proposed to be passed at the meeting, they cannot now bring up matters which took place at that meeting to support their petition, more so without applying to amend the petition.

This argument is unacceptable. The petition was filed in view of the EGM of 28 August 1994. The agenda stated the purpose for the EGM. I find that the petition contains sufficient material to link to the meeting of the 28th. In my view sufficient material has been raised by the petitioner in the petition to substantiate their fears for having filed the petition. The matters concluded on 28 August 1994 and relied on by the petitioners in their affidavits are purely evidence to support the petition. To my mind there is nothing irregular about this. The objection of the respondent must perforce fail.

Issue Of Multiplicity Of Proceedings

It has been submitted by the respondent that one of the major issues raised in the petition is the whole issue of the replacement of the earlier Board, following the contentious meeting on 11 November 1992 and the subsequent ouster of P.S. Sundram as managing director on 7 March 1993. It was pointed

out that P.S. Sundram had filed proceedings against the present respondent and the entire Board of the respondent by way of Kuala Lumpur High Court Civil Suit No. S4-22-594-93 (S4 suit) on 4 October 1993. It was urged upon me that the reliefs sought in the S4 suit are in conflict with the relief sought in the petition because the former deals with P.S. Sundram's attempt to regain a position of power in the respondent while the latter seeks to wind up the respondent.

In response to this the petitioners pointed out that this submission of multiplicity of proceedings was rejected twice; once by Abdul Malek J (as he then was) in this same winding-up petition and in the S4 suit by Rahmah Hussain JC (as she then was).

In the circumstances, I am bound by the decision of the Court of Appeal in *Hartecon JV Sdn. Bhd. & Anor. v. Hartela Contractors Ltd.* [1996] 2 MLJ 57 wherein Gopal Sri Ram JCA said at p. 66:

> We cannot over emphasize the proposition that once a Judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly.

Since this issue has already been decided twice it is a case of flogging a dead horse and I therefore reject this submission.

In the circumstances I order the winding up of the respondent under s. 218(1)(f) and (i) only.

Costs

Since costs ought to follow the event I order costs to the petitioners. But it is not proper that the respondent per se do pay the costs of this petition which clearly to my mind was precipitated by the wanton calculated and scheming minds of the recalcitrant directors of the Board who intermeddled in the affairs of the respondent by taking over the Board as of 11 November 1993. In my view this whole unhappy and unwholesome episode erupted without warning like the spewing of molten lava upon this tranquil and placid school causing this turmoil. Those directors who caused this anguish must pay. Since I had already held that equitable obligations must prevail in a case of this nature where the atmosphere was one of a family grouping it must equally apply that those who cause disunity, and with pre-planning, must be made to pay the costs of these proceedings. It is my view that the directors who took over the Board on 11 November 1993 ought to pay the costs of this petition and that the petitioners do file an action against them for the recovery of these costs. Persons who aspire to hold high office such as that of directors must realise that their conduct must be impeccable. Honesty of purpose and sincerity

of vocation ought to be the hallmark of an aspiring director. If he breaches any of these the company he manages should not be called upon to purge his sin; he has to pay out of his own pocket. With the country moving in leaps and bounds in economic success the Court must be ever vigilant to rein in those who stray.

Reported by Ling Hea Hoon